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No. 90-68

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN

Petitioner,

v.

OWEN DUANE NUNNEMAKER

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether *Harris* v. *Reed*, 489 U.S. 255 (1989), holds that a state high court's denial of habeas corpus relief without opinion, which denial is not a decision on the merits under state law, forgives a procedural default expressly claimed by an intermediate state appellate court on direct review.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, first reported at 896 F.2d 1200 (1990), was amended upon the denial of rehearing. 904 F.2d 473. A copy of the amended opinion appears in the Joint Appendix at J.A. 128-149. The unreported order of the District Court denying the petition for writ of habeas corpus appears in the Joint Appendix at J.A. 115-127. The opinion of the California Court of Appeal, First Appellate District, also unreported, appears in the Joint Appendix at J.A. 1-25.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 21, 1990. Rehearing was denied on May 25, 1990. A petition for writ of certiorari was timely filed on July 9, 1990. 28 U.S.C. § 2101(c); Supreme Court Rule 13.1, 13.4. On November 5, 1990, this Court granted certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28, United States Code, provides in pertinent part:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

STATEMENT

1. By an information filed in Sonoma County Superior Court on August 21, 1975, respondent Owen Duane Nunnemaker was charged with murder and assault with a deadly weapon, in violation of California Penal Code sections 187 and 245(a). It was further alleged that during the commission of both offenses, respondent was armed with, and did use, a firearm, in violation of California Penal Code sections 12022 and 12022.5. On January 30, 1976, the jury found respondent guilty of murder in the first degree, and further found that he was armed with, and did use, a deadly weapon during the commission of this offense. Respondent was sentenced to life imprisonment.

On June 30, 1978, the California Court of Appeal for the First Appellate District modified and, as modified, affirmed the judgment of conviction. (J.A. 1-25.) On September 27, 1978, the California Supreme Court denied respondent's petition for hearing. (J.A. 26.)

After a period of almost seven years, respondent sought collateral relief in state courts by way of petitions for writs of habeas corpus. On February 25, 1985, the Sonoma County Superior Court denied his petition. On April 29, 1985, the California Court of Appeal denied his petition without opinion. The California Supreme Court denied his first petition in that court on December 3, 1986. (J.A. 82.)

On September 7, 1987, and December 3, 1987, respectively, the United States District Court for the Northern District of California dismissed respondent's

petitions for writs of habeas corpus for failure to exhaust state remedies. (J.A. 83-87; 88-90.)

On April 7, 1988, the California Supreme Court denied respondent's second petition for writ of habeas corpus in that court. (J.A. 114.)

Upon another petition for writ of federal habeas corpus, the District Court issued an order to show cause on July 8, 1988, and denied the petition on December 9, 1988. (J.A. 115-127.)

Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On February 21, 1990, the court affirmed in part and reversed in part the judgment of the district court, with directions to consider the merits of respondent's federal claim. On May 25, 1990, the court of appeals denied rehearing and amended its opinion. 904 F.2d 473.

2. The opinion of the California Court of Appeal summarizes the events which led to respondent's conviction for the murder of his wife:

"In the afternoon of May 31, 1975 [respondent Owen Duane Nunnemaker] -- armed with an automatic weapon -- forcibly entered the home of his estranged wife, Alice, and following a struggle fired a single shot from a distance of three feet mortally wounding the victim. As witnesses to the shooting attempted to assist the fallen victim, the [respondent] restrained them from summoning aid and cut the telephone cord preventing its use to call an ambulance. One of the foster children, Linda (age 16 years), managed to exit the home and called the sheriff's office on a neighbor's telephone. When the officers arrived, Linda informed them of the shooting. After all but one of the children had exited, the officers entered

the home and observed the victim lying on the floor of the living room and another foster child, Sherry (age 17 years), at her side. During the search, they discovered the [respondent] in a rear bedroom where apparently he had just telephoned the sheriff's office requesting an ambulance. [Respondent] offered no resistance and was placed under arrest and searched; several rounds of nine (9) millimeter ammunition were found in [his] pocket; [respondent] led the officers to his car parked in front of the house where they observed the weapon used lying on the front seat.

"At trial, Linda, Sherry and Mrs. Brower testified that the [respondent] appeared sober and calm immediately after the shooting; the three arresting officers gave similar testimony concerning their observations of [respondent] at the time of his arrest.

"The [respondent] testified that he went to the home for the purpose of delivering a birthday present and to visit his children, which permission was refused by the victim. That as he and the victim were standing at the door, the victim suddenly 'launched herself toward me.' Thereafter, he could not recall any of the ensuing events until he walked to his car with his son Shawn and gave him the birthday present; he then noticed he was holding a gun in his hand which he placed in his car. Upon reentering the house, and thereafter seeing his wife lying on the floor, he telephoned the sheriff's office from the rear bedroom. [Respondent] denied that he had intentionally shot his wife whom he loved deeply.

"The defense introduced psychiatric testimony in support of a diminished capacity defense; on rebuttal, the

prosecution presented conflicting psychiatric testimony." (J.A. 3-6 [fns. omitted].)

SUMMARY OF ARGUMENT

Convicted of the first degree murder of his wife, respondent Owen Duane Nunnemaker challenged his conviction in the California Court of Appeal on the ground that his statement to a prosecution psychiatrist was elicited in violation of *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The court of appeal refused to address this claim in obedience to the legislative prohibition against considering evidentiary claims not raised at trial. The California Supreme Court denied a petition for hearing.

Almost a decade later, respondent again challenged the admissibility of the statement, this time by way of state habeas corpus. The state supreme court twice denied habeas petitions on this ground, the second time without comment or citation to authority. The Ninth Circuit held that the second denial was a rejection of the merits of respondent's *Miranda* claim and that it served to forgive a procedural default which the court of appeal had expressly invoked ten years earlier. Relying upon dictum in *Harris* v. *Reed*, 489 U.S. 255, 265 n. 12 (1989), the Ninth Circuit declared that the state high court's reliance upon a procedural rule for the denial of relief must be reflected by a "plain statement" in its order.

The Ninth Circuit has read *Harris* too broadly and has misapprehended California law. The "plain statement" rule of *Harris* presupposes that the federal habeas court is reviewing a state court's opinion, not its "silent" order denying relief. This Court's cases construing its

jurisdiction on direct review under 28 U.S.C. § 1257 teach that the significance of a silent order must be determined by reference to the law of the state. To the extent that it held that *Harris* compelled a presumption that the denial of relief by the California Supreme Court was a resolution of the merits, the Court of Appeals for the Ninth Circuit was plainly incorrect.

The court of appeals also reiterated the Circuit's misapprehension that under state law a silent denial of relief addressed the merits of the claim. In fact, it is a time-honored principle of California habeas corpus procedure that a denial of habeas relief without comment or case citation by a court, which otherwise has jurisdiction, is not a decision on the merits. When a petition for writ of habeas corpus is presented to the seven Justices of the California Supreme Court, each may have a separate reason for declining to issue the writ. When the supreme court denies habeas relief in the exercise of its original jurisdiction, it is not a determination of the merits of the petitioner's allegations. The *only* state *judgment* in this case -- the opinion of the court of appeal which affirmed respondent's conviction on direct review -- expressly and exclusively rested its rejection of respondent's *Miranda* claim upon his failure to raise the issue at trial.

Under the Ninth Circuit's opinion, a state prisoner who has failed, either inadvertently or intentionally, to raise an issue at trial or on direct appeal no longer need fear the forbidding test of cause and prejudice erected by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). To open the doors of federal court, he need only file a petition for writ of habeas corpus in the state supreme court. If that court

denies relief without comment, as the California Supreme Court does hundreds of times each year, that denial will serve both to exhaust state remedies and to forgive the procedural default. To avoid such cynical manipulation of the post-conviction remedies provided by the state and federal systems, the state supreme court must alter its procedures drastically, providing an explanation for the denial of relief. That would place an intolerable strain upon the resources of this state's highest court.

It is no exaggeration to state that the lower court's opinion, if affirmed, will serve to eviscerate the salutary rule of *Wainwright* v. *Sykes* in this and all other states which permit their supreme courts to manage their dockets by summarily denying habeas corpus relief. Such a result was neither dictated nor authorized by *Harris* and is unnecessary to provide federal habeas review to prisoners who have in good faith attempted to comply with state procedural rules. To the extent that respondent was entitled to a "plain statement" of the reasons why state courts have declined to consider the merits of his claim, he received it over twelve years ago from the state court of appeal. The subsequent silence of the state courts has not forgiven that default.

ARGUMENT

THE "PLAIN STATEMENT" REQUIREMENT OF *HARRIS* v. *REED* DOES NOT APPLY TO "SILENT" DENIALS WHICH, UNDER STATE LAW, ARE NOT DECISIONS ON THE MERITS.

The question for decision is whether the Federal Habeas Corpus Act, as explicated by this Court, requires a conclusive presumption that the silent denial of habeas corpus by a state high court is a resolution of the merits of the prisoner's claim. The Ninth Circuit held that *Harris* v. *Reed*, 489 U.S. 255 (1989), requires such a presumption, which in this case forgave a procedural default expressly invoked by a state intermediate appellate court on direct review. As a result of the opinion of the Ninth Circuit, silent denials by state high courts, either on habeas or direct review, would have the unintended effect of waiving procedural defaults, even those which are jurisdictional and hence unwaivable. This unprecedented construction of the Federal Habeas Corpus Act, distorting the principles set forth in *Harris*, gives state prisoners a clear blueprint for circumventing state procedural requirements for the orderly litigation of federal claims. The mission of the Great Writ is to vindicate due process, not abolish state procedural rules. Petitioner therefore respectfully asks this Court to reverse the judgment of the Ninth Circuit.

A. Procedural and Factual Background

After respondent had been arrested for the murder of his wife on May 31, 1975, and before he was arraigned, he was questioned by a psychiatrist at the request of the prosecution. The psychiatrist told respondent that he represented the prosecution but did not advise him that he could remain silent or consult with an attorney during the interview. The psychiatrist did not testify during the prosecution's case-in-chief, but was called as a rebuttal witness after respondent had presented a defense of diminished capacity.[1/] Although respondent's trial counsel interposed several specific objections to certain statements which the psychiatrist made in his testimony, counsel did not challenge his right to testify on the grounds that his knowledge of respondent's mental state was based upon an interview conducted in violation of respondent's constitutional rights. (J.A. 14-18; 120; 135-136.) On January 30, 1976, the jury convicted respondent of the first degree murder of his wife.

On appeal, respondent contended that the interview violated his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and that his attorney rendered ineffective

1. The California Supreme Court had recognized the need for, and authorized the conduct of, interviews by prosecution psychiatrists of the defendants who subsequently raised a defense involving insanity or mental disease or defect at trial. *In re Spencer*, 63 Cal.2d 400, 46 Cal.Rptr. 753 (1965); *see also Estelle* v. *Smith*, 451 U.S. 454, 465 (1981).

assistance for failing to object to the introduction of the psychiatrist's testimony.[2/]

The state court of appeal declined to reach the merits of the *Miranda* claim, invoking the legislatively mandated contemporaneous objection rule that forecloses appellate review of the admissibility of evidence on grounds not asserted in the trial court. Cal. Evid. Code § 353(a). The ineffective assistance claim was rejected on the merits. The court found that defense counsel had a tactical reason for failing to object to the psychiatrist's testimony. (J.A. 17; 148.) The state supreme court denied respondent's petition for hearing on September 27, 1978. (J.A. 26.)

In 1985, respondent again challenged his conviction, this time by way of state habeas corpus. His petitions in the Sonoma County Superior Court and the California Court of Appeal were denied on February 25, 1985, and April 29, 1985, respectively. On May 22, 1986, he filed a petition in the California Supreme Court, raising as he did on direct appeal claims under *Miranda* and the right to effective assistance of counsel. On December 3, 1986, the state supreme court denied the petition.[3/]

2. He did not contend that the interview violated his rights under the Sixth Amendment.

3. The order cited, *inter alia, In re Waltreus,* 62 Cal.2d 218, 42 Cal.Rptr. 9 (1965), which states: "These arguments were rejected on appeal, and habeas corpus ordinarily cannot serve as a second appeal." *Id.* at 225, 42 Cal.Rptr. at 13.

Respondent then filed petitions for writs of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. On September 8, and December 3, 1987, the court dismissed the petition because it did not clearly establish exhaustion of state remedies. 904 F.2d at 474, J.A. 83-87; 88-90. On March, 1, 1988, respondent filed a second petition for habeas corpus relief in the state supreme court, alleging that his statements to the prosecution psychiatrist were inadmissible because obtained during interrogation when counsel was not present. Respondent "contend[ed] he was deprived of a fair trial as a result of defense counsel's failure to object to the testimony of the prosecution psychiatrist. . . ." (J.A. 98.) On April 7, 1988, the state supreme court again denied the petition, this time without comment or case citation. (J.A. 114.)

Respondent filed a second petition under 28 U.S.C. § 2254 in district court, which ordered petitioner to show cause on July 8, 1988, and denied the petition on December 9, 1988. The district court found that respondent's state trial court procedural default barred any review of the Fifth Amendment challenge to the testimony of the prosecution psychiatrist,[4/] and that respondent had not been deprived of effective assistance of counsel. (J.A. 115-127.)

On appeal to the Court of Appeals for the Ninth Circuit, the court affirmed the denial of relief on the

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4. Contrary to the assertion of the Ninth Circuit (904 F.2d at 475), respondent did not challenge his statement on Sixth Amendment grounds in the district court. That claim was made for the first time in the Ninth Circuit.

ineffective assistance claim, but reversed the denial of relief on the *Miranda* claim and remanded the matter to the district court with instructions to consider the merits of the latter claim. The court held that under *Harris* v. *Reed, supra*, "where, as here, a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bars, federal habeas review is not precluded." 904 F.2d at 476 (fn. omitted).

B. **The Parameters of Procedural Default**

In *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court acknowledged "that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Id.* at 438. At the same time, however, the Court seemingly rejected categorically the proposition that a state procedural default which constitutes an adequate and independent state ground barring direct Supreme Court review under 28 U.S.C. § 1257 should also divest federal courts of jurisdiction to consider a federal claim in a petition for writ of habeas corpus under 28 U.S.C. § 2254. 372 U.S. at 399, 426-434. In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), however, this Court held that, although a procedural bar did not defeat the jurisdiction of a federal habeas court, the prisoner's claim should be denied unless he could show cause for and actual prejudice from the default. *Id.* at 87.

The prisoner must show both cause and prejudice. *Murray* v. *Carrier*, 477 U.S. 478, 493-495 (1986); *Engle* v.

Isaac, 456 U.S. 107, 134 n. 43 (1982). An attorney's inadvertent failure to recognize the factual or legal basis for a claim does not constitute cause. *Carrier, supra*, at 487; *Engle, supra*, at 133-134. Rather, to establish cause the prisoner must show either (1) ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984); or (2) the existence of "some objective factor" (*Carrier, supra,* at 488), such as (a) the unavailability to counsel of the factual or legal basis for the claim (*Reed* v. *Ross*, 468 U.S. 1, 16 [1984]), or (b) "'some interference by officials,' *Brown* v. *Allen*, 344 U.S. 443, 486 (1953), [which] made compliance impractical. . . ." *Carrier, supra*, at 388. In terms of prejudice, the prisoner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States* v. *Frady*, 456 U.S. 152, 170 (1982).

The requirement that the prisoner show cause for the procedural default must yield only to "the imperative of correcting a fundamentally unjust incarceration." *Engle,* 456 U.S. at 135. This Court has defined such an incarceration as one which is based upon the conviction of a factually innocent defendant as a result of a constitutional violation. *Carrier*, 477 U.S. at 495-496; *Smith* v. *Murray*, 477 U.S. 527, 537-539 (1986). "[I]n such an extraordinary case, . . . a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Carrier, supra*, at 496.

The *Sykes* requirement applies even to procedural defaults which otherwise foreclose consideration of constitutional error affecting the truthfinding function of

the trial. *Engle* v. *Isaac*, 456 U.S. at 129. It makes no difference that the procedural default occurred on appeal rather than at trial. *Murray* v. *Carrier*, 477 U.S. at 489-492. *Sykes* requires only that the state procedural rule be adequate and independent. *See Harris* v. *Reed,* 489 U.S. at 260.

A state procedural rule is not "adequate" unless it is ""strictly or regularly followed."" *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988) (Citations omitted). "A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted." *Prihoda* v. *McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990). A state ground is "independent" if it is not interwoven with federal law (*Ake* v. *Oklahoma*, 370 U.S. 68, 74-75 [1985]), and the state court actually relied upon it. *Ulster County Court* v. *Allen*, 442 U.S. 140, 152-154 (1979). Actual reliance, however, was not always clear from the state court's opinion. *Harris* v. *Reed, supra,* attempted to remedy this difficulty.

C. ***Harris* v. *Reed***

In *Harris*, the prisoner was convicted of murder and challenged his conviction on direct appeal, raising only the issue of the sufficiency of the evidence. The Appellate Court of Illinois affirmed. The prisoner then filed a petition for post-conviction relief in the Circuit Court, claiming for the first time that his trial counsel was ineffective. The Circuit Court dismissed the petition; the Appellate Court again affirmed.

The Appellate Court's order of affirmance adverted to the "well-settled" principle of state law that issues which could have been raised on direct appeal were waived and could not be litigated on a petition for post-conviction relief. The court then considered and rejected the merits of prisoner's ineffective-assistance claim.

Rather then seek review in the Illinois Supreme Court, the prisoner filed a petition for writ of habeas corpus in United States District Court, raising his ineffective counsel claim. The District Court found that the state court had noted but did not invoke a procedural default and rejected the claim on the merits. The Court of Appeals affirmed, but concluded that the Illinois Appellate Court relied, at least alternatively, upon the procedural default. For that reason, the Court of Appeals declined to reach the merits of the ineffective assistance claim. 489 U.S. at 257-259.

This Court reversed, holding that the state court opinion did not "clearly and expressly" invoke a state procedural default as a ground for its rejection of the prisoner's claim. The Court began its analysis from the premise that the adequate and independent state ground doctrine was the "historical and theoretical basis" for *Wainwright* v. *Sykes*. *Harris* 489 U.S. at 260. It then observed that *Michigan* v. *Long*, 462 U.S. 1032 (1983), required a "plain statement" in the state court opinion that its decision rested upon an adequate and independent state ground in order to divest this Court of jurisdiction on *direct review* under 28 U.S.C. § 1257. 462 U.S. at 1042. This Court perceived a "common problem" facing this Court on direct review and federal habeas courts under 28 U.S.C. § 2254: A possible lack of certainty about the

basis for the state court's adverse resolution of the criminal defendant's claim. "Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ""clearly and expressly"" states that its judgment rests on a procedural bar." 489 U.S. at 263.

This Court expressed its belief that the "plain statement" rule would not compromise the state interests of finality, federalism, and comity, but would instead confer several important benefits. Explicit reliance by a state court upon a procedural default would relieve the federal habeas court of the requirement of conducting "an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *Id.* at 265. A state court, familiar with state law and the record before it, can determine the existence of a procedural default more reliably and efficiently. A "plain statement" of the existence of the default would allow the "federal court rapidly to identify whether federal issues are properly presented before it." *Id.*

Petitioner readily agrees with the precise holding of *Harris* that a federal claim resolved adversely to a criminal defendant in a state court opinion is reviewable on federal habeas corpus unless the opinion clearly and expressly relies upon a state procedural default. It must be stressed, however, that the last state judicial resolution of the prisoner's claim in *Harris* occurred in a 7-page written *opinion*. For that reason *Harris* provides insufficient guidance to determine the legal significance of an order which denies relief but provides no reason or case citation.

For reasons which follow, petitioner submits that unexplained affirmances or denials of discretionary review must be construed in the context of local law. This principle finds compelling support in the decisions which have addressed the availability of direct review under 28 U.S.C. § 1257 from a "silent" denial by a state high court.

D. **The Significance of "Silent" Orders**

Harris held that the "plain statement" rule, formulated in the context of direct review by this Court under 28 U.S.C. § 1257, was equally applicable to habeas corpus review under 28 U.S.C. § 2254. Therefore, it seems entirely reasonable, indeed inescapable, that this Court's cases construing section 1257 should be equally relevant in informing a district court's interpretation of a "silent" denial in connection with its discretion under section 2254. See *Prihoda* v. *McCaughtry*, 910 F.2d at 1383. A majority of Federal Circuits have followed this approach. *Id*; *Felton* v. *Barnett*, 912 F.2d 92, 94-95 (4th Cir. 1990); *Coleman* v. *Thompson*, 895 F.2d 139, (4th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3325 (1990); *Harmon* v. *Barton*, 894 F.2d 1268, 1272-1274 (11th Cir. 1990); *Russell* v. *Lynaugh*, 892 F.2d 1205 (5th Cir. 1989); *Arce* v. *Smith*, 889 F.2d 1271 (2d Cir. 1989); *Evans* v. *Thompson*, 881 F.2d 17, 123 n.2 (4th Cir. 1989); *Ellis* v. *Lynaugh*, 873 F.2d 830 (5th Cir. 1989); *contra*: *Nunnemaker* v. *Ylst*, 904 F.2d 473 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3344 (1990); *Johnson* v. *Burke*, 903 F.2d 1056 (6th Cir. 1990); *Hill* v. *McMakin*, 893 F.2d 810 (6th Cir. 1989).

Section 1257 of Title 28, United States Code, provides in pertinent part: "Final judgments or decrees rendered by

the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . ." When a state intermediate appellate court has written an opinion supplying reasons for its disposition and judgment, and the state high court has denied discretionary review, on petition for writ of certiorari this Court has "look[ed] straight through a denial of discretionary review" (*Prihoda* v. *McCaughtry*, 910 F.2d at 1383) and has examined the opinion of the highest state court which has provided an explanation. *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 678 n.1 (1968); *Hammerstein* v. *Superior Court*, 341 U.S. 491, 492 (1951); *American Ry. Expr. Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923); *Sullivan* v. *Texas*, 207 U.S. 416 (1908).

Even if the higher court gives as its reason for declining to review the lower court judgment its approval of the opinion below, such a statement does "not take from the refusal its ostensible character of declining jurisdiction." *American Ry. Exp. Co.* v. *Levee, supra*, at 21. If the higher court cannot review the lower court's judgment because the moving party failed to comply with state procedural requirements (filing an untimely petition for review, for example), neither the higher court's order of dismissal nor the lower court's judgment is reviewable by this Court. *Newman* v. *Gates*, 204 U.S. 89 (1907).

The application of these familiar rules to a petition for writ of habeas corpus under section 2254 would not be burdensome for a federal district court sitting in California. Assume that the prisoner appealed to the California Court of Appeal, a remedy available to all persons convicted of felonies in California. Cal.Pen. Code § 1237. If the judgment is affirmed and the California Supreme Court denies discretionary review (Cal. Rules of

Court, rule 28, 29), the prisoner may petition for writ of federal habeas corpus to allege his federal claim. *Roman* v. *Estelle*, ___ F.2d ___ (9th Cir. 1990), 1990 U.S.App. Lexis 18802. Because the state high court's denial of review is not an affirmance on the merits (*People* v. *Triggs*, 8 Cal.3d 884, 890-891, 106 Cal.Rptr. 408 [1973]), the federal district court need only examine the judgment of the court of appeal to determine the reasons for the rejection of the federal claim. *Hammerstein* v. *Superior Court*, 341 U.S. at 492. If the state court of appeal declined to consider the merits of a claim for a procedural reason -- failure to object at trial, for example -- the federal district court would have to consider the efficacy of that state procedural bar. The denial of review, although "silent" in the sense that it gave no reasons and cited no authorities, did not forgive the procedural default expressly invoked by the court of appeal.

Harris does not supersede this vital principle of state appellate procedure. The California Supreme Court's 4,488 case dispositions in fiscal year 1988-1989 included 1,464 petitions for review in criminal cases and 1,005 original habeas corpus petitions. 2 Judicial Council of California, 1990 Annual Report at 24, Table 1. If the denial of review constituted a rejection of the merits of each petition, the supreme court could no longer superintend the jurisprudence of this State. An apt analogy would be an enactment by Congress of a statute which declared that a denial of certiorari by this Court must be construed as a rejection of the merits of the petition and an endorsement of the lower court opinion. For any state court system which presently places no significance upon a denial of discretionary review, a "plain

statement" requirement would place an impossible burden upon the state high court. Even the Ninth Circuit presently respects the state rule that a denial of direct review carries no independent legal significance. *Compare Nunnemaker* v. *Ylst*, 904 F.2d at 476 nn. 4-5, *with McQuown* v. *McCartney*, 795 F.2d 807, 809-810 (9th Cir. 1986).

If the state prisoner has failed to perfect his appeal in the state's high court after a judgment in the intermediate appellate court, local law must also govern the significance of the high court's denial of review. *Cf. Newman* v. *Gates, supra*. Thus, if the applicable rules of appellate procedure establish that the denial of review was jurisdictional, the high court's failure to issue a "plain statement" to that effect does not waive the procedural bar on which the court is exclusively relying. *See Coleman* v. *Thompson*, 895 F.2d at 143.

The Ninth Circuit held that the foregoing principles were inapplicable to this case because the California Supreme Court had exercised its *original*, not its *appellate*, jurisdiction when it denied respondent's petition for habeas corpus on April 7, 1988. 904 F.2d at 476. This Court drew no such distinction in *Harris*, which reviewed an opinion issued by the Illinois Appellate Court in the exercise of its *appellate* jurisdiction. *Cf. Ex parte Hawk*, 321 U.S. 114, 116 (1944). If this Court had relied upon the distinction suggested by the Ninth Circuit, the failure of the Illinois Court to provide a "plain statement" would have been legally inconsequential. A more cogent reading of *Harris*, one which conforms with this Court's section 1257 cases, is that the "plain statement rule" applies to

opinions which provide explanations, not to silent orders which deny discretionary review.

In support of its holding, the Ninth Circuit invoked this Court's dictum in *Harris* that "a state court that wishes to rely on a procedural rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.'" *Nunnemaker*, 904 F.2d at 476, citing *Harris*, 489 U.S. at 265 n. 12. Whatever the merits of such a rule as applied to a trial court in exercise of its habeas jurisdiction,[5/] it is particularly inappropriate to guide an appellate court. As will be explained, *infra*, California Supreme Court habeas corpus jurisdiction has always been wholly discretionary. Each Justice may have his or her own reasons for denial: a lack of merit, a failure to exhaust, a failure to object at trial, a failure to object on appeal, a failure to plead with sufficient particularity. In addition, many, if not most, habeas petitions contain more than one claim, each of which may be denied for different reasons by each Justice. The inescapable result -- one surely not intended by this Court -- would be to require the California Supreme Court, if it does not want to excuse a procedural default, to decide each claim in each habeas petition on a ground upon which a majority of the Justices concur. The supreme

5. California law requires a superior court, the court of general jurisdiction in California, to give "a brief recital of the reasons for the denial" in its order. Cal. Rules of Court, rule 260(e).

court cannot increase its workload by 800 cases[6/] to vindicate the Ninth Circuit's untenable concept of procedural default.

Reflection upon this problem discloses an additional complication. If three Justices deny habeas relief on procedural grounds and one Justice votes to deny solely for failure to state a prima facie case for relief, the Ninth Circuit's opinion provides absolutely no guidance to decide whether the denial was for substantive or procedural reasons.

Simply stated, the rule which petitioner proposes would require federal habeas courts to look to local law to determine the significance of a silent denial of relief. Thus, this Court's cases construing section 1257 should inform the exercise of habeas jurisdiction under section 2254. Courts which reject this approach have asserted that *Harris* counsels against "returning us to second-guessing the state court's determination of state law." *Johnson* v. *Burke*, 903 F.2d at 1060. This rationale is misleading, for it creates the illusion that a federal habeas corpus does not need to consider state law or the history of the prisoner's litigation in state courts in order to resolve his federal claims. In fact, a federal court passing

6. In fiscal year 1988-89, 837 original petitions for writ of habeas corpus were filed in the California Supreme Court. 2 Judicial Council of California, 1990 Annual Report, at 24. Petitioner's review of the California Supreme Court's published minute orders reveals that the state high court issued 550 "silent" denials in calendar year 1989 and 499 such denials in the first nine months of 1990.

upon a petition for writ of habeas corpus cannot avoid delving deeply into questions of state law.

Before resolving the merits of a prisoner's claim, a federal habeas court must decide at least four preliminary issues: (1) the cognizability of the claim; (2) the adequacy of the state courts' determination of questions of fact; (3) exhaustion of state court remedies; and (4) the possible existence of a procedural default barring federal review. *Wainwright* v. *Sykes*, 433 U.S. at 78-79. Only the first issue may be resolved without reference to state law. The federal habeas court must review extensive portions of the record to determine whether it fairly supports any factual findings critical to the prisoner's claim. *Marshall* v. *Lonberger*, 459 U.S. 422, 432 (1983). The district court must also determine whether the prisoner exhausted state remedies by fairly presenting his claim to the state courts. *Castille* v. *Peoples*, 489 U.S. 346 (1989). Consequently, the federal habeas court must discover whether a meaningful state court remedy is still available -- a question of state law. *Id.*; *Harris* v. *Reed*, 489 U.S. at 269 (conc. opn.).

If the custodian asserts a procedural default, the "plain statement" rule does not relieve the federal court of evaluating its "adequacy," in terms of the consistency and predictability of its application by state courts (*Johnson* v. *Mississippi*, 486 U.S. at 587-589), and its "independence," in terms of its connection to resolutions of federal law. *E.g., Delaware* v. *Prouse*, 440 U.S. 648, 651-653 (1979). These inquiries often require extensive review of state law. *E.g. Ulster County Court* v. *Allen*, 442 U.S. at 150-152. Finally, if the district court finds a procedural default, the prisoner is entitled to show cause and prejudice. Efforts to show cause, often based upon allegations of ineffective

assistance of counsel, usually require careful examinations of the state court record, may necessitate time-consuming evidentiary hearings, and, occasionally, may require assessment of the development of state substantive law at the time of trial. *E.g., Engle* v. *Isaac*, 456 U.S. at 131-134 & n. 40. An allegation of prejudice, of course, will inevitably require the same extensive factual review.

A federal habeas court cannot avoid the obligation of evaluating a prisoner's claim against the background of the state court record and pertinent local law. *Harris* teaches that inquiries into state law should be minimized when possible but does not pretend they can be eliminated entirely. *See, e.g., Rummel* v. *Estelle*, 445 U.S. 263, 267 n.7 (1980). Federal courts long have been obliged to familiarize themselves with state substantive law in the civil context. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Comprehension of state criminal procedural rules should not prove any more difficult.

E. The Silent Denial of the State Supreme Court Did Not Forgive The Procedural Default Invoked by the State Court of Appeals.

Finally, the relevant state procedural rules are identified and applied to this case. The Ninth Circuit erred in concluding that the silent denial of habeas relief by the state supreme court impliedly forgave the procedural default expressly invoked by the state court of appeal ten years earlier.

1. **State Habeas Corpus Procedure.**

The writ of habeas corpus is guaranteed by the California Constitution (Art. I, § 11) and statute (Cal. Pen. Code, §§ 1473 *et seq.*). Although the supreme court and courts of appeal have original jurisdiction in habeas corpus proceedings (Cal.Const., Art. VI, § 10), a prisoner seeking such collateral review is expected to file his petition first in superior court, the court of general jurisdiction which has the power to hear evidence and resolve factual disputes. *See e.g., In re Hillery*, 202 Cal.App.2d 293, 20 Cal.Rptr. 759 (1962).

The petition is an application for a writ of habeas corpus; it must allege the reason why the petitioner's imprisonment is illegal. Cal. Pen. Code § 1474; *People* v. *Pacini*, 120 Cal.App.3d 877, 883-884, 174 Cal.Rptr. 820 (1981). If the petition does not state facts which, if true, would entitle the petitioner to relief, the court must deny the petition. *Griggs* v. *Superior Court*, 16 Cal.3d 341, 347, 128 Cal.Rptr. 223 (1976); *In re Swain*, 34 Cal.2d 300, 304, 209 P.2d 793 (1949). If the petition does state a prima facie case for relief, the court then issues an order to show cause. *See In re Lewallen*, 23 Cal.3d 274, 278 n.2, 152 Cal.Rptr. 528 (1979); *In re Hochberg*, 2 Cal.3d 870, 873 n. 2, 87 Cal.Rptr. 681 (1970). The order to show cause directs the custodian to serve and file a written return, which must "plainly and unequivocally" "state the authority and cause of such imprisonment or restraint." Cal. Pen. Code § 1480. The return, which must be "responsive to the grounds actually presented in the petition" (*People* v. *Green*, 27 Cal.3d 1, 43 n. 28, 164 Cal.Rptr. 1 [1980]), "functions analogously to a '"complaint

in a civil proceeding"' in asserting grounds of legality and 'as to any factual allegations it makes.'" *People* v. *Pacini*, 120 Cal.App.3d at 884, 174 Cal.Rptr. at 826.

The petitioner then responds by filing a traverse in which he "may deny or controvert any of the material facts or matters set forth in the return. . . ." Cal. Pen. Code § 1484; *In re Saunders*, 2 Cal.3d 1033, 1047, 88 Cal.Rptr. 633 (1970). "The traverse, and the petition whereby stipulation or acquiescence it is treated as a traverse . . . are analogous to the answer in a civil proceeding. . . ." *Ibid.* "The issues are joined in this manner, and 'new matter set up in the petition [and traverse] which tends to invalidate the apparent effect of the process set forth in the return is deemed denied and must be proved by the party alleging it, namely the petitioner.'" *Id.* at 1047-1048, 88 Cal.Rptr. 633. If the petitioner "except[s] to the sufficiency" (Cal. Pen. Code, § 1484) of the return in his traverse, he has in effect raised questions of law by a procedure analogous to demurrer. By the same token, if the return acknowledges the allegations in the petition and traverse, relief may be granted without a hearing if those allegations justify such action. *In re Saunders*, 2 Cal.3d at 1048, 88 Cal.Rptr. 633; *In re Masching*, 41 Cal.2d 530, 533, 261 P.2d 251 (1953). If the issue is not the legal significance of undisputed allegations, but the existence of disputed facts, the superior court may compel the attendance of witnesses and may "do and perform all other facts and things necessary to a full and fair hearing and determination of the case." Cal. Pen. Code § 1484.

If the superior court denies relief, its order "shall contain a brief recital of the reasons for the denial."[7] Cal. Rules of Court, rule 260. The petitioner has no right to appeal the superior court's denial, but must file a new petition in either the court of appeal or the supreme court. *Gardner* v. *California*, 393 U.S. 367, 368 (1969); *In re Crow*, 4 Cal.3d 613, 621 n. 8, 94 Cal.Rptr. 254 (1971). With one exception, the rules of pleading and proof delineated above are generally applicable to appellate courts. The supreme court and courts of appeal have no power to find facts. If a petition and return generate a factual conflict, the appellate court will appoint a referee to hold a hearing and make findings and conclusions. *In re Egan*, 24 Cal.2d 323, 327, 149 P.2d 693 (1944). Alternatively, when the court of appeal issues an order to show cause, it may make it returnable before the superior court, which will hold the hearing. *In re Hochberg, supra*, 2 Cal.3d at 873-874 n. 2, 87 Cal.Rptr. 681.

Should the court of appeal deny the writ of habeas corpus, the prisoner has two possible remedies. If the court of appeal denies relief without opinion, the prisoner simply petitions for habeas corpus in the supreme court. Cal. Pen. Code § 1475; *In re Crow*, 4 Cal.3d at 621 n. 8, 94 Cal.Rptr. 254. If, however, the court writes an opinion which denies relief, an action necessitated by the issuance of an order to show cause and the filing of a return (*In re Mazoros*, 76 Cal.App.3d 50, 52-53, 142 Cal.Rptr. 609 (1977)), a petition for review in the state supreme court

7. No similar rule governs California appellate courts.

is the preferred, though not mandatory, remedy.[8] Cal. Pen. Code § 1506; Cal. Rules of Court, rule 28; *In re Michael E.*, 15 Cal.3d 183, 193 n. 15, 123 Cal.Rptr. 103 (1975).

Habeas corpus generally will not lie to consider issues which were raised, or could have been raised, on direct review (*In re Terry*, 4 Cal.3d 911, 927, 95 Cal.Rptr. 31 (1971); *In re Waltreus*, 62 Cal.2d 218, 225, 42 Cal.Rptr. 9 (1965)), unless newly discovered facts or a change in the law merit discretionary reconsideration of the claim. *In re Terry, supra*; *In re Bevill*, 68 Cal.2d 854, 863 n. 9, 69 Cal.Rptr. 599 (1968). Similarly, a contention which has been raised and rejected in a prior application for habeas corpus will not be reconsidered. *In re Lynch*, 8 Cal.3d

8. The choice of remedies is the petitioner's although the California Supreme Court may summarily deny either the petition for habeas corpus or petition for review. However, the Ninth Circuit presumes that a silent habeas denial is on the merits, while a silent denial of a petition for review is not. *McQuown* v. *McCartney*, 795 F.2d at 807, 809-810 (9th Cir. 1986). This distinction has been justified on the ground that the petition for review invokes appellate jurisdiction, but the habeas corpus petition invokes original jurisdiction. This rationale has no basis in California Supreme Court practice and is contrary to *Ex parte Hawk*, 321 U.S. at 115-116. In short, the integrity of state procedural rules, enforced by procedural default, depends on the petitioner's often fortitous choice of a title for his petition. The Ninth Circuit's opinion in the case suggests that *Harris* v. *Reed* obliterates the arid distinction of *McQuown* by extending the presumption of silent waiver of procedural defaults to petitions for review on direct appeal. 904 F.2d at 476 n. 4.

410, 439 n. 26, 105 Cal.Rptr. 217 (1972); *In re Miller*, 17 Cal.2d 734, 735, 112 P.2d 10 (1941).

Finally, it is important to comprehend the significance of a summary denial of a writ of habeas corpus such as that issued by the California Supreme Court upon respondent's second application for habeas corpus relief. Supreme Court habeas corpus jurisdiction has always been wholly discretionary. Supreme Court of California, Practices and Procedure (1990 Rev.) at 12, 13; *see People* v. *Connor*, 270 Cal.App.2d 630, 638 n.2,; 76 Cal.Rptr. 72 (1969). Hence, the court may summarily deny a petition without a statement of reasons or citation to case authority. The California Constitution requires that "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Cal.Const., Art. VI, § 14. Because a summary denial is without opinion, it cannot be a determination of a "cause" within the meaning of the state constitution. *See People* v. *Medina*, 6 Cal.3d 484, 490, 99 Cal.Rptr. 630 (1972); *Myers* v. *Ylst*, 897 F.2d 417, 426-428 (9th Cir. 1990) (diss.opn.). For this reason a summary denial of a habeas petition does not establish the law of the case. *People* v. *Pacini*, 120 Cal.App.3d at 884, 174 Cal.Rptr. at 826. It is not a judgment which conclusively and definitively establishes the rights and obligations of the parties. To give such preclusive effect to a summary denial would violate the California Constitution. The Ninth Circuit's opinion has, in effect, accused the California Supreme Court of habitually violating its own charter.

2. **Disposition of This Case.**

In light of well-established principles of state habeas corpus, it is beyond dispute that the California Supreme Court never has forgiven the procedural default invoked by the California Court of Appeal. To reach this conclusion a federal habeas court need only "look through" the silent denial habeas corpus in 1988 and the silent denial of hearing in 1978 to the opinion of the court of appeal, which declined to consider the merits of respondent's claim by reason of his failure to object at trial. Cal. Evid. Code § 353.

Even if the first denial of habeas relief by the state supreme court were relevant to this issue, it did not forgive the procedural default. Most of the contentions made by respondent in his first petition for writ of habeas corpus in the state supreme court had been raised on direct review. (J.A. 5-21; 53-74.) Habeas corpus will not lie to relitigate claims that were raised, or could have been raised, on appeal. *In re Waltreus, supra,* which the supreme court cited in its first minute order (J.A. 82), stands for this proposition. In his habeas petition, respondent also challenged the admissibility of the testimony of "emotionally disturbed children," (*see* J.A. 77-79), a claim which was not raised on appeal. The supreme court then addressed that contention with its citation of *In re Swain, supra*, which holds that "vague, conclusionary allegations . . . are insufficient to warrant issuance of the writ," but its denial "is not a ruling on the merits. . . ." 34 Cal.2d at 303-304, 209 P.2d at 793. Thus, relief could not be granted unless petitioner explained his contention with sufficient particularity and,

in addition, disclosed the reasons for any delay in the presentation of those facts. *Id.*

Although federal courts sitting in California appreciate the significance of *Waltreus* and *Swain* to the California Supreme Court (J.A. 83), they are not required to decipher summary denials of habeas corpus in order to determine their legal basis. Rather, they need only remember one overarching principle: A summary denial of habeas corpus, even with a case citation, is not a "judgment" which in any way replaces or supplants an opinion of an appellate court affirming a criminal conviction. The last state court rendering a "judgment" in this case was the court of appeal, which refused to consider respondent's *Miranda* claim by reason of his procedural default at trial. A subsequent summary denial of habeas relief by a California state court is not a judgment which forgives the procedural bar.

The last denial of habeas relief by the state supreme court, in April of 1988, cited no cases, presumably because the petition merely renewed a claim which previously had been rejected by the supreme court in its denial of habeas relief. *See In re Bevill*, 68 Cal.2d at 863 n.9, 69 Cal.Rptr. 599. Petitioner again stresses that it was unnecessary for a federal court to attempt to discern the reason for the denial. Rather, an examination of the opinion of the state court of appeal conclusively reveals that the state appellate judiciary declined to reach the merits of petitioner's claim because of his procedural default. Subsequent silent orders by the supreme court denying direct review and collateral relief do not add to or detract from the significance of the written opinion, which contained a "plain statement" required by *Harris*.

The Ninth Circuit's misapprehension of this principle of state law arose not from a careful examination of California procedural rules but from an untenable transformation of the circuit's own rules respecting exhaustion into principles governing procedural default. In *Harris* v. *Superior Court*, 500 F.2d 1124 (9th Cir. 1974) (*en banc*), the Ninth Circuit held that the California Supreme Court's summary denial of a state habeas petition is a decision on the merits for purpose of *exhaustion*. Such a rule is a necessary fiction created to avoid a waste of the prisoner's time in attempting to comply with the exhaustion requirement. *See Thompson* v. *Procunier*, 539 F.2d 26, 28 (9th Cir. 1976). If the state court's silence were understood as a denial on procedural grounds, the state prisoner might be placed in legal limbo, unable to obtain a ruling on the merits from the highest state court, unable to cross the exhaustion threshold of the federal district court. That outcome would advance no legitimate interest of the state or the petitioner. Understandably, this Circuit concluded that a defendant whose state habeas petition was denied without explanation had exhausted his state remedies.

This result could have been better explained on the ground that the purpose of the exhaustion doctrine, "to minimize friction between our federal and state systems of justice by allowing the State an initial *opportunity* to pass upon the correct allege violations of prisoners' federal rights," (*Duckworth* v. *Serrano*, 454 U.S. 1, 3 [1981] [emphasis added]), was adequately served by a state habeas petition which fairly presented the federal claim, thus providing the highest state court with an *opportunity* to consider that claim. *See Castille* v. *Peoples*, 489 U.S. at

351. Unfortunately, the Ninth Circuit chose instead to characterize the state court's summary denial as a ruling on the merits. It then applied this presumption, developed in the context of exhaustion, to *procedural defaults*, holding that a summary denial forgave any and every failure to follow this state's trial and appellate procedural rules. *E.g., Lewis* v. *Borg*, 879 F.2d 697 (9th Cir. 1989); *LaRue* v. *McCarthy*, 833 F.2d 140 (9th Cir. 1987); *Maxwell* v. *Sumner*, 673 F.2d 1031 (9th Cir.); *cert. denied*, 459 U.S. 976 (1982); *Thompson* v. *Procunier, supra*; *contra, McQuown* v. *McCartney*, 795 F.2d 807 (denial of hearing not a ruling on the merits).

To put it bluntly, the Ninth Circuit's attempt to reconcile its misapprehension of state law with its perceived necessity of providing a federal forum for state prisoners has resulted in chaos. As a result, a carefully reasoned opinion of the California Supreme Court which invokes a procedural default on direct review would be supplanted by a casual minute order of a superior court denying relief without comment. If the court of appeal and supreme court also summarily deny relief, a procedural bar miraculously is transformed into a decision on the merits. Indeed, even if the superior court denies relief in a written opinion which invoked a procedural bar, a one-line denial by the state court of appeal and supreme court will also produce this wholly unintended transformation.

Much, though not all, of the confusion engendered by the Ninth Circuit's decisions can be clarified by the rule which petitioner has proposed: A silent state court order should be construed by a federal habeas court under section 2254 as it is by this Court under section 1257. So

construed, a silent denial of habeas relief does not forgive, or any way alter, a procedural default invoked by an appellate court in a written opinion. *Harris* does not require a "plain statement," once plainly stated, to be endlessly reiterated.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

DATED: December 19, 1990

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